

DECISION

TALBOT COUNTY BOARD OF APPEALS

Appeal No. 21 -1725

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (the Board) at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 6:30 p.m. on September 13, 2021, on the Application of **Adrian and Jennifer Park** (collectively, the Applicant).

The Applicant is requesting three (3) Critical Area variances: (1) a variance to construct a 545 sq. ft. addition located sixty-two and eight-tenths feet (62.8') from mean high water (MHW) at its closest point; (2) a variance to construct a seventy-five (75) sq. ft. pervious deck located fifty-eight feet (58') from MHW at its closest point; and (3) a variance to construct a stairway for the deck located forty-eight feet (48') from MHW at its closest point. The request is made in accordance with Chapter 190, Article III, §190-15.11 and Article VII § 190-58 of the *Talbot County Code* (the *Code*). The property is located at 21587 Bar Neck Cove Road, Tilghman, MD 21617 in the Village Hamlet/Critical Area (VH/CA). The property owners are Adrian and Jennifer Park. The property is shown on Tax Map 51 Grid 4 Parcel 68.

Board of Appeals members Phillip Jones, Chairman, Frank Cavanaugh, Vice Chairman; Paul Shortall, Louis Dorsey, Jr. and Zakary A. Krebeck were present for the hearing. Anne C. Ogletree, acted as attorney for the Board of Appeals. Staff members present were Miguel Salinas, Planning Officer, Brennan Tarleton, Assistant Planning Officer and Elisa Deflaux, Planner II. Prior to the commencement of the hearing Mr. Salinas introduced Mr. Chase Phillips, a new Planning Staff member. Mr. Phillips also attended the meeting. Nancy Sullivan of Sullivan Building & Design, Inc. was present on behalf of the Applicant, as was Adrian Park, one of the Applicants. No other members of the public were present.

The Chairman inquired if all members had visited the site individually. He received affirmative responses from each member. The following Board exhibits were then offered and admitted into evidence as indicated:

Exhibit 1. Application for a Critical Area Variance with Attachment A.

Exhibit 2. Tax Map with subject property highlighted.

Exhibit 3. Notice of Public Hearing for Star Democrat.

- Exhibit 4. Newspaper Confirmation.
- Exhibit 5. Notice of Public Hearing with list of adjacent Property Owners attached.
- Exhibit 6. Critical Area Variance Standards with Attachment B.
- Exhibit 7. Staff Report prepared by Elisa Deflaux, Planner II.
- Exhibit 8. Sign Maintenance Agreement/ Sign Affidavit.
- Exhibit 9. Comments from Critical Area Commission Staff.
- Exhibit 10. Authorization letter.
- Exhibit 11. Independent Procedures Disclosure and Acknowledgement Form.
- Exhibit 12. Aerial Photo.
- Exhibit 13. Letter from Miguel Salinas dated 5/21/21.
- Exhibit 14. Elevation Certificate.
- Exhibit 15. Critical Area Lot Coverage Computation Worksheet.
- Exhibit 16. Proposed Plan prepared by Rauch Inc. dated June 2021.
- Exhibit 17. Existing Plan Prepared by Rauch, Inc. dated April 2020.
- Exhibit 18. Existing Floor Plan and Reflected Ceiling Plan dated 04/26/21.
- Exhibit 19. Proposed Plans by Topsider Homes dated 12/04/20.

Mr. Jones requested that those planning to give testimony be identified and sworn. The witnesses, Ms. Sullivan and Mr. Park, were identified and both were sworn. The Chairman then requested that the Applicant proceed with its presentation.

Mr. Park began by recounting his history with the property. It was purchased in 2014. The family is from out of the area, but began spending time at the property and want to spend more time there. The Applicants have four (4) grown children, one of whom is married, and one of whom is about to be married. They recognize that they will need more space than they currently have. The dwelling is about fourteen hundred square feet in size with three functional bedrooms, two bathrooms and is “pretty small”. What the Applicants wish to do is add additional living space with a couple of bedrooms and a bath. They believed it would be a simple process. They actually began several years ago, with the help of Bob and Nancy Sullivan, and with the assistance of surveyors and engineers and are hoping to complete the preparatory work to be able to move forward with the construction phase of the project. He inquired if the Board wished him to continue with the overview or proceed with the detailed information developed over the course of the application process.

The Chairman noted that Attachment B to the Critical Area Variance Standards form, Exhibit 6, responded to the issues the Board needed to address, and suggested that the Applicant address the concerns raised by the Critical Area Commission staff (CAC) regarding the lack of unique conditions of either the land or the structures and the lack of “unwarranted hardship” identified in its comment letter, Exhibit 9. The concern was that the Applicant had not explained why they could not pursue other locations or means of expansion that do not intrude into the Shoreline Development Buffer (SDB).

Nancy Sullivan, 21417 Wharf Road, Tilghman, MD 21671, the Applicant’s authorized agent, responded that the Applicant could address those issues. Ms. Sullivan stated that the structure in question was a “Topsider” building that only permits one floor, so that a vertical expansion is impossible. The dwelling is an engineered pod type structure designed to be supported by a pedestal.

Mr. Jones commented that the existing residence received unobstructed winds coming across open water. He asked if the manufacturer of the structure considered wind pressure when designing the pod’s form. Ms. Sullivan was unsure, but felt confident that since the structure was an engineered building wind load had been taken into consideration. She offered a letter from the manufacturing firm verifying her statement that a vertical expansion was impossible as Applicant’s Exhibit 1. Mr. Jones admitted into evidence the letter, consisting of multiple pages, as Applicant’s Exhibit 1.

The Chairman asked Ms. Sullivan to address the CAC concerns regarding the location of the residence in the SDB. He added that there were aerial photographs submitted by the CAC showing the location of the residence in the past and it would appear that the residence was in fact built in the SDB. He added that the residence had been legally erected, regardless of location.

Ms. Sullivan pointed out that a McCrone survey with the original permit package showed what McCrone ‘found’ at the time. She was not sure what had changed, but there is a substantial difference between that earlier plat and the current Rauch plat. The McCrone plat showed the residence a hundred feet (100’) from the water. Mr. Park added that the Applicant now believes the McCrone plat to be in error and is no longer asserting that the property lost sixty feet (60’) waterfront to erosion since the McCrone survey. The Applicant now believes that the residence was actually built in the SDB.

Mr. Krebeck asked if the Applicant was amending the original application regarding the building location and received an affirmative answer. Mr. Jones commented that he had personal

knowledge of other instances in which the McCrone surveys were found to be inaccurate. He felt that the survey error explained why the Applicant had made the statement concerning location in its application, and, after being made privy to the CAC aerials and information had corrected the application for the record. He asked if any of the Board members had other questions concerning location or uniqueness. There were no concerns regarding location or uniqueness of the property.

After reviewing the sufficiency of the Applicant's remaining answers, the Chairman noted that the CAC had questioned whether the project was in harmony with the Critical Area Program and its goals. Pointing out that the Staff Report, Exhibit 7, mentioned lots of things either happening on the property or things that had already happened on the property that might relate to this issue, he asked if the Applicant wished to amend its answer to include the things mentioned in the Staff Report.

Ms. Sullivan responded stating that the pod being proposed for the site was the smallest one made by Topsider. It contains four hundred seventy-five square feet (475 sq. ft.) of living space. The remaining square footage requested is for the connecting hallway. The Applicant planned to work with drainage and plantings to keep runoff away from the bay waters so that there would be a negligible impact on the environment.

Mr. Cavanaugh asked where the plantings would be positioned and to what area the runoff would be directed. Mr. Park answered that if one walked the property, one would see an old shed, and the drainage would be directed to the left of that structure. Ms. Sullivan added that the plantings would be required for storm water management as well as to obtain a permit, and the Applicant hoped to combine the two requirements to create as little an impact on the environment as possible.

Mr. Krebeck asked if the structure would have gutters. Ms. Sullivan stated it would. Mr. Krebeck surmised that the gravel pad shown on the site plan was intended to collect the rainwater from the downspouts. Ms. Sullivan agreed. He next questioned the impact of the pedestal. Ms. Sullivan responded that the pedestal would be on a thick concrete foundation, and the area around the pedestal, its rain shadow area, would be graveled and pervious.

The Chairman next asked Mr. Shortall if he had questions or concerns. He responded that he first had definite concerns, but looking at the property and knowing that a vertical expansion was not possible made him more comfortable with the proposal.

Mr. Park apologized for the condition of the grass for the Board's visit. The family had not been down for a week or so, and it was long. One of the members stated he had visited before the sign was even up. Mr. Park commented that the grass was probably under better control at that time.

Mr. Dorsey stated that he believed his questions on storm water had been answered. He had observed that there were no existing gutters and wanted to confirm that there will be gutters on the addition. Ms. Sullivan stated guttering was planned, adding that she believed the gutters were not required in 2001 when the original structure was erected. Mr. Dorsey explained that the Board usually wished to see a 'concept' plan for storm water management showing how the water was to be directed at the site. The application was lacking a concept plan, but the Applicant had testified as to how it was to be accomplished. He was satisfied with the explanation.

Mr. Cavanaugh commented that he wished to address the "unwarranted hardship" issue. He was satisfied that a vertical expansion was impossible, and felt the location of the addition was due to the Applicant's desire to have the addition be a part of the main structure, rather than being constructed as a separate guest house in some other area of the property. He thought the placement was also influenced by the fact the addition was to accommodate family rather than visitors or other guests. Ms. Sullivan agreed with his supposition. She pointed out that the Rauch plat showed a newly established sewage disposal area (SDA) that has affected most of the lot. The only remaining area for placement of the structure would be near the road, in the corner of the property quite a distance from the existing structure. The plat shows there is not much buildable area on the property.

Mr. Cavanaugh inquired about the existing septic system, wanting to know if it would handle the addition of the new bedrooms. Ms. Sullivan reported that the Applicant had started its investigation by contacting the health department, as, in her experience, that approval may be the most difficult to obtain. Following that contact, the Applicant was made aware they will have to add an additional drain field, and perhaps more than one. There were also several upgrades made to the existing system as a result of those discussions. Mr. Cavanaugh suggested that the new requirements would further limit the ability to build a separate structure. Ms. Sullivan agreed explaining that a sewage disposal reserve area had also been required. Platted reserve SDAs were not required in 2001.

Mr. Jones asked if Planning staff had any questions or anything to add, and was informed it did not.

Mr. Krebeck wished to explore a comment in the Staff Report, Exhibit 7, regarding the use of non-structural erosion controls by marsh creation. He wanted to know if this was a state or county project. Mr. Park stated it was not. The family knew it was moving into a highly erodible area. They thought it would help to stabilize the property, and did the project themselves independent of any governmental plan or requirement. Mr. Krebeck asked if the plantings were in front of or behind the riprap. Mr. Park said the family had extended the riprap from in front of the house to the south towards the large marsh area and a bit to the west. The Chairman commented that the riprap had an opening which would allow more water circulation and thought that design was a smart idea. Mr. Cavanaugh wanted to know if the erosion control had worked. Mr. Park said it had absolutely stabilized the shoreline, noting that there was now an additional spot where the shoreline had eroded some six (6) or seven (7) feet, in the past two (2) years. The family would be addressing that area in the future.

In response to a reminder from Planning Staff regarding the stairs, Mr. Jones believed that the Board would deal with all of the variance requests in one motion. He opened the meeting to discussion by the Board members.

Mr. Shortall believed that with the additional testimony the Applicant had met the requirements of the ordinance.

Mr. Cavanaugh stated that he initially was concerned after reading the CAC comments. Although the Board is not bound by those comments, it takes them seriously. He felt the SDA issues make the property unique. One wouldn't want the family in a separate dwelling a great distance from the main structure. He never thought a vertical expansion would be viable. It's a very unusual house to begin with, and needs to be supplemented with another pod rather than a contemporary residence. He was comfortable that the Applicant had met the necessary criteria. He complimented the Applicant on the erosion control measures taken.

Mr. Krebeck concurred with the other members that a vertical expansion was not feasible, and was comfortable that the Applicant has made a positive impact on water quality with the non-structural shoreline erosion control project. The pedestal has a small footprint, and the pervious surface around it will also lessen any impact. He would support the variances.

Mr. Dorsey concurred with his fellow Board members regarding the unwarranted hardship issue. His only remaining issue is with the storm water management concerns. He would have liked to see a concept plan but felt that the Applicant had addressed the issue in testimony. He would approve the application.

The Chairman agreed. He added that this is a small house on a large waterfront lot, most of which is wet or not buildable. The form, round or octagonal, means less interior space, making it less usable than a rectangular or linear house. The location chosen for the addition is almost between the house and the garage. That area could never be a functioning buffer - it would always have high traffic and be pounded down. For this reason he believed the planned location is appropriate for the addition.

The CAC has been very helpful in guiding the Board. The Board has always considered the CAC advice. However, the Board may not always agree with the CAC, particularly in those cases involving smaller houses where the fact finders must consider the needs of the family. This is one of those cases. He felt that the CAC has not always been consistent. This Board has had three cases this year involving construction in the SDB. *Skipton Heritage* involved a complete teardown of a waterfront residence. The property was huge, the house could have been rebuilt further away, outside the hundred-foot (100') SDB. The location was much more sensitive from the erosion standpoint than the location currently before the Board. There was no objection from the CAC staff on that case. Most recently, in the *Marvel* case, once the front setback was granted, there was a small area where a house could be built. The proposed house was a big house. It barely encroached into the SDB. The residence was new construction. It was architect designed. It could have been redesigned to avoid the encroachment, but the CAC staff did not suggest that.

In this case the request is for a small house. There is evidence it can't go up. There are other limiting factors concerning location. For these reasons Mr. Jones considered the variances to be fully justified.

Having considered the *Code*, the Application and the testimony presented, the Board makes the following findings of fact and conclusions of law:

1. The Applicant has submitted written applications for three (3) Critical Area variances: a variance to construct a 545 sq. ft. addition located sixty two and eight tenths feet (62.8') from mean high water (MHW) a variance to construct a seventy five (75) sq. ft. pervious deck located fifty eight feet (58') from MHW; and (3) a variance to construct a stairway for the deck located forty eight feet (48') from MHW.¹ Exhibit 1.

¹ The Staff Report recognized that the *Code* does not require a variance for the stairway. See Exhibit 7.

2. The public hearing was properly advertised, the property was posted, and the adjacent land owners were properly notified. Exhibits 3, 4, 5 and 8.
3. The existing residence was erected in its current location in 2001. It replaced a then existing residence in that location. The 2001 application was accompanied by a site plan done by a licensed surveyor showing the structure outside the one-hundred foot (100') SDB. The Applicant now believes that survey to have been in error. Based on the 2001 site plan, the structure was legally permitted and inspected at the time it was built. The structure is a Top Sider pod residence currently consisting of two pods with approximately 1,415 sq. feet of living space. Each pod is mounted on a concrete pedestal, and is currently elevated. A letter from the manufacturer, Applicant's Exhibit 1, states that a vertical expansion is impossible. The sewage disposal area and the reserve sewage disposal area take up much of the remaining buildable area on the property. The proposed location for a third pod, between the existing residence and the garage, would be on land unsuited for a planted buffer. The only other location available would require a separate structure at the far end of the property. The 2001 survey error, the necessity for a larger drain field and a sewage reserve area create "unwarranted hardship" that would permit encroachment into the SDB.
4. The Applicant has demonstrated that there is no other building location that would permit the Applicant to enlarge its existing residence, an activity permitted any property owner by variance in the Critical Area. The proposed location is farther from MHW than the existing structure. The proposed pod addition is the smallest made by the manufacturer. The pedestal has a small footprint, and will be surrounded by a pervious graveled surface.
5. The granting of the variances requested will allow the property owner the same rights allowed to other property owners in the VH zoning district – the right to modify the existing dwelling to meet family needs.
6. The Applicant purchased the property in 2014 in its current condition. The need for the variances involved are caused by the site's limitations –

including the need for a greatly expanded sewage reserve area , shoreline erosion, and the 2001 survey mistake that caused the existing residence to be built within the SDB.

7. The Applicant, at its expense, has implemented significant shoreline erosion controls by planting marsh grass and creating a non-structural erosion control project to the south and west of the 2001 riprap. The rain shadow of the proposed pod will be gravel, thus creating pervious surface for storm water. The Applicant will be required to mitigate for disturbance in the SDB, and plans to combine the mitigation plantings with those required for storm water management. The runoff will be directed to a preselected area (to the left of the existing shed) thus improving water quality.
8. The Applicant's voluntary shoreline erosion control plan as well as the projected plantings will improve water quality by reducing sediment discharge into the Bay, thus improving aquatic habitats. The pervious deck proposed will also provide the Applicant with recreational space while not increasing water runoff flow.
9. The proposed addition pod is the smallest available. Since a vertical expansion is not possible, and a separate structure at a distance from the main house is impractical, the proposed addition, including the proposed drainage and plantings, is the minimum adjustment necessary to provide functional living space for the Applicant's family while protecting the environment and improving the existing water quality.

For the reasons set out in the Board's findings, Mr. Cavanaugh made a motion to approve the requested variances subject to the conditions suggested by the Planning staff. Those conditions are:

1. The Applicants shall make an application to the Office of Permits and Inspections, and follow all rules, procedures and construction timelines as outlined regarding new construction;
2. The Applicants shall commence construction on the proposed improvements within eighteen (18) months from the date of the Board of Appeals approval.

3. The Applicants shall comply with and address all Critical Area Commission comments and requirements, including the completion of a Buffer Management Plan that complies with the Critical Areas law.

Mr. Dorsey seconded the motion. The Chairman called for a vote, and the motion passed 5-0

HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS, ORDERED THAT THE VARIANCE BE GRANTED.

GIVEN OVER OUR HANDS, this 22ND day of OCTOBER, 2021.

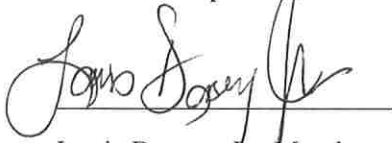
TALBOT COUNTY BOARD OF APPEALS



Phillip Jones, Chairman



Frank Cavanaugh, Vice Chairman



Louis Dorsey, Jr., Member



Paul Shortall, Member



Zakary Krebeck, Member